SUPREME COURT OF QUEENSLAND

CITATION:	*R v Layne* [2012] QCA 227
PARTIES:	**R** **v** **LAYNE, Leisa Marie Nora** (appellant)
FILE NO/S:	CA No 47 of 2012 DC No 325 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction & Sentence
ORIGINATING COURT:	District Court at Ipswich
DELIVERED ON:	24 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2012
JUDGES:	Muir and White JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal against conviction is dismissed.** **2. Leave to appeal against sentence is refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted by a jury of perjury – where the appellant was convicted of driving a car without a licence on 25 July 2007 – where, during an application to re-open sentence, the appellant gave testimony to the effect that she was not the driver of the car at that time – whether the verdict reached by the jury was unreasonable or could not be supported having regard to the evidence CRIMINAL LAW – APPEAL AND NEW TRIAL – APPEAL AGAINST SENTENCE – GROUNDS FOR INTERFERENCE – SENTENCE MANIFESTLY EXCESSIVE OR INADEQUATE – where the appellant was convicted by a jury of perjury – where appellant was sentenced to two years imprisonment, suspended after serving nine months and operational for a period of three years – whether the sentence imposed was manifestly excessive *Criminal Code* 1899 (Qld), s 125, s 668E(1)

Festa v The Queen (2001) 208 CLR 593; [2001] HCA 72, cited
M v The Queen (1994) 181 CLR 487; [1994] HCA 63, cited
MFA v The Queen (2002) 213 CLR 606; [2002] HCA 53, cited
R v Edwards (1996) 90 A Crim R 510, cited
R v Frame [2009] QCA 9, cited
R v Le [1996] 2 Qd R 516; [1995] QCA 479, cited
R v Matauaina [2011] QCA 344, cited
R v Pacey (2005) 158 A Crim R 151; [2005] QCA 203, considered

COUNSEL: The appellant appeared on her own behalf
A W Moynihan SC for the respondent

SOLICITORS: The appellant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree with the reasons of Philippides J and with her proposed orders.

[2] **WHITE JA:** I have read the reasons for judgment of Philippides J and agree with her Honour's reasons and the orders which she proposes.

[3] **PHILIPPIDES J:** The appellant was convicted of one count of perjury on 21 February 2012 after a trial in the District Court. She now appeals that conviction on the ground that it is unreasonable or cannot be supported having regard to the evidence pursuant to s 668E(1) of the *Criminal Code*. Additionally, she applies for leave to appeal against her sentence of two years imprisonment, suspended after serving nine months and operational for a period of three years, on the ground that it is manifestly excessive.

Appeal against conviction

Background

[4] The appellant was charged that on 25 July 2007 she drove a motor vehicle, not at that time being the holder of a licence authorising her to drive.

[5] On each occasion when the matter was mentioned in the Magistrates Court at Ipswich on 20 August 2007 and 3 September 2007, a woman answering to the appellant's name appeared and sought an adjournment on the basis that she intended to seek evidence from Queensland Transport that her licence was not suspended at the relevant time. When the matter was again mentioned on 25 September 2007, a person answering to the appellant's name appeared, entered a guilty plea and accepted the appellant's traffic history was correct. However, the person maintained when sentenced that the licence was not suspended. In those circumstances, the Magistrate, McLaughlin SM, set the plea aside and listed the matter for trial on 19 December 2007.

[6] There was no appearance on 19 December 2007. However, a letter was received by the court in the appellant's name, citing her return mailing address, and requesting

the matter be transferred to the Beenleigh Magistrates Court. The appellant was sent written notice that the matter was to remain at Ipswich and was listed for hearing on 22 January 2008. There was no appearance on 22 January 2008, and the appellant was convicted in her absence and fined $200.

[7] On 14 May 2010, the appellant appeared in the Magistrates Court at Ipswich before McLaughlin SM and applied to re-open the proceedings of 22 January 2008. She gave sworn evidence that she was not driving the vehicle on 25 July 2007 (because she had loaned the car to another person called Michael Perkins), that she did not drive at night time after 6.30 pm at the latest and that she was in hospital from about 10 September to the first week of November 2007. She also gave evidence that she did not appear in the matter on 20 August 2007, 3 September 2007 or 25 September 2007 at the Ipswich Magistrates Court.

[8] In consequence of that sworn evidence, the appellant was charged with two counts of perjury. The first count concerned her testimony that she did not appear in the matter on 20 August 2007, 3 September 2007 or 25 September 2007. Subsequently, after the learned trial judge ruled the Crown could not on the evidence maintain the charge as pleaded, the Crown entered a nolle prosequi in relation to that count.

[9] The second count, in respect of which the appellant was convicted, related to the appellant's testimony that she was not driving at the relevant time on 25 July 2007. In relation to that count, the appellant's defence was that the evidence identifying the appellant as the driver was unreliable and that her statement that she was not driving was not made wilfully or knowingly but inadvertently as a result of her being "unreliable" on the matter. The appellant's counsel argued that the appellant's "grasp of reality is not what it should be and it's clear that she is the sort of person who would be notoriously unreliable and because of that you would acquit".

[10] The Crown called Senior Constable Rau. He gave evidence that, at about 9.00 pm on 25 July 2007, he intercepted the appellant driving a maroon Commodore station wagon with the registration number 945-ITQ. (In cross-examination Rau conceded that he incorrectly recorded in the QP9 report the vehicle's colour as blue, and that the registration number of the vehicle was in fact 745-ITQ). Rau's evidence was that a female was driving and there were two male passengers. He asked the female driver to produce her licence, which she was unable to do. The woman stated her name as Leisa Marie Layne and gave a date of birth and an address. When Rau checked the police computer, it revealed that her licence was suspended. Rau said he informed the woman of that fact and warned her not to drive any further. About 15 minutes later, Rau saw the vehicle again and intercepted it. As the same woman was still driving, he issued her with a notice to appear.

[11] Rau also gave evidence that he saw the woman again on 14 May 2010 inside the Ipswich Courthouse. His evidence was that he was "very certain" the woman he saw at the Ipswich Courthouse on that occasion was the woman who had been driving the vehicle. He said that the woman's facial features were similar to his mother's and "that's why I can remember her quite clearly". The Crown also led evidence in the form of the audio recordings and attached transcript of the proceedings on 14 May 2010.

[12] In addition, the Crown led evidence in the form of the audio recordings of the proceedings in the Ipswich Magistrates Court on 20 August 2007, 3 September

2007 and 25 September 2007 to support Rau's identification evidence and to demonstrate that the appellant's statement was wilfully and knowingly false. That evidence included that a woman appeared in court in answer to the summons issued on 25 July 2007 to the female driver, and the woman who appeared gave the appellant's name. The woman, who pleaded guilty on 25 September 2007, did not contest that she was driving but rather insisted that she was properly licensed.

[13] The Crown also led evidence of an audio-visual recording of a police interview with the appellant on 29 October 2007 (relating to another matter) so the jury could compare the voice on each recording to determine if it was indeed the appellant who had appeared in court on each occasion. That interview also demonstrated that the appellant was not in hospital at a time she claimed she was, and that she consistently claimed that she was authorised to drive but that Queensland Transport had made a mistake.

Grounds of appeal

[14] The appellant's outline of argument for appeal sets out the basis for the contention that the conviction should be set aside.

[15] The appellant referred to the learned trial judge's direction to the jury in her summing up that it was for them "to judge whether a witness was telling the truth". In that regard, the learned trial judge explained that many factors might be considered in deciding what evidence was accepted and what general considerations were relevant in that regard. That is a standard direction and an entirely orthodox one. However, the appellant complained that in that process the judge erred in inviting the jury to utilise audio tapes dated 3 and 25 September 2007 and 14 May 2010,[1] a photograph taken on 29 October 2007 and a video dated 29 October 2007, to prove that she was the driver of the vehicle on 25 July 2007. The appellant's submission was that, because this evidence post-dated the 25 July 2007 offence, it could not be used to corroborate Rau's testimony.

[16] The appellant raised an error of law in respect of s 125 of the *Criminal Code* which provides that a person cannot be convicted of committing perjury on the uncorroborated evidence of one witness. The appellant contended that Rau's evidence was uncorroborated by any other witness and not corroborated by any photo or audio-visual evidence of 25 July 2007.

[17] Further, the appellant contended that the audio-visual evidence actually pertained to the count 1 offence, on which the Crown had entered a nolle prosequi. The suggestion was that the audio-visual evidence was unfairly prejudicial in relation to count 2 because the jury were likely to give it more weight than it deserved or be diverted from their task: *Festa v The Queen* (2001) 208 CLR 593 at 609-610. The appellant contended that that audio-visual evidence did not prove that she was the driver on 25 July 2007 and, given Rau had no photo or fingerprint evidence to corroborate his evidence, he could have been mistaken as to the identity of the driver on 25 July 2007. The appellant referred to the description given by Rau of the woman in question being 170 cm, whereas the appellant contended she was 163 cm. Additionally no reference was made to scars which the appellant bore, nor

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[1] The appellant's submissions refer to an audio tape dated 14 May 2007 but it is accepted that this is a typographical error and it was her evidence given in the Magistrates Court on 14 May 2010 to which the appellant refers.

was there any recording of the hair colour of the woman identified by Rau. The verdict was therefore unreasonable or could not be supported on the evidence.

Discussion

[18] In her summing up, the learned trial judge outlined the evidence in respect of the allegation that the appellant knowingly gave false testimony in a judicial proceeding (the application to reopen the sentence on 14 May 2010) that she was not the driver of the vehicle in question on 25 July 2007. Her Honour explained that the jury was required to be satisfied beyond reasonable doubt that the appellant was in fact the driver of the car and that she knowingly made a false statement.

[19] In relation to the evidence of Rau, her Honour summarised his evidence concerning the evening of 25 July 2007, including his error as to the registration number of the vehicle, explaining that it was a matter for the jury whether such matters were significant or not. The learned trial judge also referred to his evidence identifying the appellant as the person he saw on 14 May 2010. Her Honour gave standard directions about the caution to be heeded in relation to identification evidence.

[20] The learned trial judge properly referred the jury to other evidence led by the prosecution as capable of supporting the visual identification evidence of Rau. This included the audio evidence of the appearances on 20 August 2007, 3 September 2007 and 25 September 2007. Her Honour correctly explained the basis upon which that evidence was available to support the identification evidence given by Rau. That is, that the woman who appeared answered to the appellant's name and additionally, if it was accepted that it was the appellant who appeared on each mention, that she did not on any of those occasions contest that she was driving, but rather contended that she was properly licensed and that there had been an error on the part of Queensland Transport.

[21] Her Honour gave the jury appropriate directions with respect to voice identification. She explained that the jury could, in considering whether the voice on the audio tapes was that of the appellant, use as a comparison the tape of 14 May 2010 (which had been acknowledged to be that of the appellant) and the record of interview of 29 October 2007 which was accompanied by a visual image of the appellant. Her Honour also mentioned that regard could be had to the repetition of the account, at the mentions and in the October 2007 interview, that Queensland Transport had made an error in relation to the licence.

[22] The learned trial judge was correct in proceeding on the basis that that other evidence was available to corroborate the evidence of Rau. The fact that that evidence post-dated the offence of 25 July 2007 did not mean that it was not so available. Nor was there unfair prejudice in the admission of the audio-visual evidence. Given the manner in which the jury were directed that they were able to use that evidence, there was no prospect that they would accord it more weight than it deserved or that it would divert them from their task.

[23] As the respondent submitted, it is abundantly clear that, on the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty: *M v The Queen* (1994) 181 CLR 487 at p 493 and *MFA v The Queen* (2002) 213 CLR 606 per McHugh, Gummow and Kirby JJ at pp 623-624.

Sentence application

[24] In seeking leave to appeal against the sentence imposed as manifestly excessive, the appellant contended that the proper exercise of the sentencing discretion suggested a sentence that was wholly suspended or suspended after a period of six months. In support of that submission, reliance was placed on the appellant's personal circumstances. She has health problems and has dependent children aged eight, 10, 13 and 16 and cares full time for her husband.

[25] The respondent submitted that the effect that the appellant's incarceration will have on her family was of limited weight in the absence of highly exceptional circumstances: see *R v Le* [1996] 2 Qd R 516 and *R v Edwards* (1996) 90 A Crim R 510. Furthermore, it was submitted by the respondent that the sentence of two years imprisonment was well within range and that the appellant was fortunate, having gone to trial, that the judge suspended the term before the statutory eligibility date.

[26] I note that at sentence the appellant's experienced counsel made the concession that a sentence of two years imprisonment was appropriate. This Court has observed that in such circumstances the applicant for leave faces a difficult task in seeking to establish that the sentence imposed was manifestly excessive: *R v Frame* [2009] QCA 9 at [6]; *R v Matauaina* [2011] QCA 344 at [13]. In *R v Pacey* [2005] QCA 203, this Court reviewed a number of comparables at [20] to [28]. Williams JA, with whom Jerrard JA and Mullins J agreed, concluded at [29]:

> "It can be seen from that review of the authorities that actual imprisonment has almost invariably been imposed although in many instances the offender had no previous convictions and often there were other mitigating factors."

[27] The offence was a serious one and, as the learned sentencing judge stated, the appellant was persistent in committing the perjury. Her Honour had regard to the appellant's personal circumstances, which she specifically mentioned. None of the comparatives referred to in *Pacey* suggest that the two year sentence imposed, requiring that a period of nine months be served by way of actual custody, was manifestly excessive. In my view, the sentence imposed was within the sound exercise of the sentencing discretion.

Orders

[28] The orders I would make are:

(a) dismiss the appeal against conviction;
(b) refuse leave to appeal against sentence.